

MALAYAN BANKING BHD

a

v.

DR BETHARAJOO KRISHNASAMY

HIGH COURT MALAYA, IPOH

b

CLEMENT SKINNER JC

[CIVIL APPEAL NO: 12-105-97

10 FEBRUARY 2000

CIVIL PROCEDURE: Trial - Objection to documents in disputed bundle
- Objection to exhibits marked and tendered in evidence - When may and
should objection be taken

c

EVIDENCE: Course of trial - Objection to documents in disputed bundle
- Objection to exhibits marked and tendered in evidence - When may and
should objection be taken

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The respondent was the guarantor of a loan of RM30,000 granted by the
appellant to a third party. The third party defaulted and the appellant
commenced proceedings for recovery against the respondent. At the close
of the appellant's case, counsel for the respondent submitted that there was
no case to answer on the ground, *inter alia*, that the two documents in
the disputed bundle ('the exhibits'), which were tendered to prove service
of the letter of demand, were inadmissible, and that in their absence, no
demand had been made on the respondent in accordance with the terms
of the guarantee.

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The sessions judge held that although the exhibits had been admitted in
evidence and marked as exhibits, no judgment had yet been pronounced,
and it was still open to the respondent's counsel to object to the
admissibility of the exhibits. She then proceeded to reject the exhibits and,
having found that no proper demand had been made on the respondent,
dismissed the appellant's claim. The appellant appealed.

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Held:

[1a] The relevant question was whether the respondent was
objecting to the fact that the exhibits were in themselves inadmissible
or whether objection was taken as to the mode of proving them.

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[1b] In the former, if a document is declared inadmissible by statute,
it remains inadmissible notwithstanding a failure to object to its
admission at the first available opportunity. In the latter, it is
essential that an objection should be taken at the trial before it is
marked as an exhibit and admitted to the record.

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- a* [2] A party seeking to rely on a document which is placed in the disputed bundle is not precluded from trying to have the document admitted in evidence without formal proof. It is incumbent on the opposing counsel to be vigilant and to take immediate objection when such an attempt is made. If the opposing counsel remains silent, then it will be too late to object at the submission stage.
- b*
- c* [3] On the evidence available, there was no doubt that the objection was taken as to the mode by which the exhibits were proved, and not that the exhibits were in themselves inadmissible. As such, the objection should have been taken at the trial before the exhibits were marked and admitted in evidence. The sessions judge had misdirected herself in law.
- d* [4] However, although admitted in evidence, its evidential value, and whether the contents of the exhibits stood proved, remained questions to be decided by the trial court. As such, the order of the sessions court was set aside and the case remitted back to it for decision.

[Appeal allowed with costs.]

e **Case(s) referred to:**

- Boonsom Boonyanit v. Adorna Properties Sdn Bhd* [1997] 3 CLJ 17 (***foll***)
Chong Khee Sang v. Pang Ah Chee [1981] 1 MLJ 377 (***refd***)
Gopal Das & Anor v. Sri Thakurji & Anor AIR [1943] PC 83 (***foll***)
Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor [1997] 4 CLJ 509 (***fol***)
- f* *Malaysia National Insurance Sdn Bhd v. Rubber Development Corporation* [1986] 2 CLJ 285 (***refd***)

Other source(s) referred to:

Sarkar's Law of Evidence, 15th edn

- g* *For the appellant - Chong Kok Keun; M/s Ngan & Tan & Partners*
For the respondent - Kerpai Singh; M/s Bachan & Kartar
Reported by Anne Khoo

JUDGMENT

h **Clement Skinner JC:**

This is an appeal against the decision of the learned Sessions Court Judge, who on 17 October 1997 dismissed the plaintiff's (hereafter the appellant) claim against the defendant (hereafter the respondent) after a full trial. The facts giving rise to the claim may be shortly stated.

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The appellant granted a loan of RM30,000 to one Supramaniam s/o Veerasamy (hereafter the borrower) which the respondent guaranteed by deed dated 8 June 1979. One of the conditions stated in the guarantee was that the respondent would repay on demand all the advances and loans made by the appellant to the borrower.

In the events that transpired, the borrower defaulted in repayment of the loan as a result of which the appellant commenced proceedings against the respondent on the guarantee. In bringing its claim, the appellant pleaded, *inter alia*, that by a letter dated 17 December 1987, its solicitors had made a demand on the respondent for repayment of the sum of RM44,664.02 but the respondent had failed to pay the same. The respondent raised several defences to the appellant's claim but only one defence engages our attention in this appeal: the respondent pleaded that he had not received any prior demand for payment from the appellant as required by the terms of the guarantee; as such, no liability to pay had arisen.

In preparing for trial, the parties prepared and submitted bundles of agreed and disputed documents. Included in the disputed bundle were two documents: the letter of demand dated 17 December 1987 allegedly sent to the respondent by the appellant's solicitors by A.R. Post; and an A.R. Card which allegedly bore thereon the signature of the respondent acknowledging receipt of the letter of demand.

The parties also, pursuant to directions of the court, agreed on issues to be tried. Out of four issues agreed upon, two only need to be mentioned here. The court was asked to determine "whether proper demand had been made by the plaintiff against the defendant for the repayment of the debts" and "whether the letter of guarantee is enforceable against the defendant."

At the trial, the appellant called as a witness one Noh bin Idris (SP2). He was an officer of the bank in charge of doubtful loan collection. Whilst giving his evidence in chief, SP2 stated that when the borrower defaulted in his loan, the plaintiff went against the respondent as guarantor. This is what SP2 stated:

Apabila peminjam gagal membuat bayaran, kita terus pergi ke penjamin.
Kita juga ada hantar surat kepada penjamin melalui peguam kami.

SP2 was then referred to the letter of demand (which formed p. 3 and 4 of Bundle A) and he stated "Ini adalah surat peguam kami tersebut." Counsel for the appellant then asked the court to mark the letter of demand as an exhibit; counsel for the respondent did not object thereto and the learned Sessions Judge marked the document as 'P7'. SP2 was similarly referred to the A.R. Card (which formed p. 5 of Bundle A) and he said

- a* “Ini adalah kad A.R. yang telah dikembalikan setelah ditandatangani oleh penjamin.” Counsel for the appellant then asked the court to mark the A.R. Card as an exhibit; counsel for the respondent did not object thereto and the document was duly marked ‘P8’ by the learned Sessions Judge.
- b* At the close of the appellant’s case, counsel for the respondent informed the court that the defence was electing to submit that there was no case for the respondent to answer and no evidence would be called by the defence if that submission failed. During those submissions, counsel for the respondent contended, *inter alia*, that P7 and P8 were inadmissible in evidence and without those two exhibits the appellant was unable to prove service of the letter of demand on the respondent. At the conclusion of submissions, the learned Sessions Judge ruled that although both P7 and P8 had been admitted in evidence and marked as exhibits, they were inadmissible and accordingly rejected them.
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- d* In coming to her decision, the learned Sessions Judge whilst accepting the principle stated in the case of *Boonsom Boonyanit v. Adorna Properties Sdn. Bhd.* [1997] 3 CLJ 17; [1997] 2 MLJ 62, that a party objecting to the admissibility of a document should do so at the trial stage and not at the appellate stage, went on to say that as no judgment had yet been pronounced by her in this case, it was still open to counsel for the respondent to raise objections to the admissibility of P7 and P8 at the submission stage.
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- f* Having rejected P7 and P8, the learned Sessions Judge went on to find that the plaintiff had not proved that a proper demand had been made on the defendant in accordance with the terms of the guarantee and so dismissed the plaintiff’s claim.
- g* In arguing this appeal, counsel for the appellant contended that when the letter of demand (P7) and the A.R. Card (P8) were sought to be introduced in evidence and the court was asked to mark them as exhibits, counsel for the respondent should have but did not object to their being so marked and having failed to do so, could not object to their admissibility at the submission stage of a hearing. Counsel for the appellant further submitted that once a document is marked as an exhibit, its contents becomes admitted in evidence for the purpose of the trial and accordingly P7 and P8 should not have been rejected but instead considered by the learned Sessions Judge in arriving at her decision.
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- i* In responding to this appeal, counsel for the respondent adopted a two pronged approach. He first repeated the submissions made in the court below, namely, that as the two documents formed part of the ‘disagreed bundle’ it was imperative that the maker of the documents be called to

tender them in evidence; to tender the documents through a witness who has no knowledge of their contents is tantamount to tendering hearsay evidence and where hearsay evidence is sought to be introduced, it matters not that no objection is taken or that the documents have become marked as exhibits, hearsay evidence remains inadmissible. In support, counsel for the respondent relied on the case of *Malaysia National Insurance Sdn. Bhd. v. Rubber Development Corporation* [1986] 2 CLJ 285; [1986] 2 MLJ 124.

As a fall back position, counsel for the respondent argued that the fact that the two documents got marked, without objection as exhibits, did not mean that they had become documents “agreed and admitted for all purposes”. At best P7 and P8 had acquired the status of documents included in an agreed bundle where the truth of the contents of such documents would still have to be proved. In support, counsel cited the following passage of the judgment of Shankar J (as he then was) in the case of *Chong Khee Sang v. Pang Ah Chee* [1981] 1 MLJ 377:

... once a document is included in an Agreed Bundle, it is no longer necessary to prove their existence or execution. Nor is it necessary to produce the original. But so far as the contents of the documents are concerned the truth of the same has still to be proved in the absence of any specific admission of the facts therein contained.

In deciding this appeal, it is essential to first identify what the true nature of the objection taken against P7 and P8 in the Sessions Court was. No doubt, in taking the objection, counsel for the respondent had described these two documents as inadmissible but the question is, what was it that counsel objected to about these documents? Was counsel objecting to the fact that P7 and P8 were in themselves inadmissible, as for example they were declared inadmissible by a statute; or was counsel objecting to the mode of proving these two documents ie, that the mode of proof put forward was irregular or insufficient in that they were being tendered in evidence by someone other than their maker. The question asked is not unimportant because depending on what the objection to these documents were, the law governing a party’s right to object thereto and when the objection should be taken differs in each situation.

The position is very clearly put by the Court of Appeal in the case of *Boonsom Boonyanit v. Adorna Properties Sdn. Bhd. (supra)* where at p. 72 his Lordship Gopal Sri Ram JCA speaking for the court said:

The law of evidence draws a distinction between the admissibility of a document and the mode of proving it. If a document is declared inadmissible by a statute then, failure to object to the inadmissible document at the first available opportunity does not prevent the party adversely affected from raising

- a* the matter on appeal. Inadmissible evidence, whether in civil or criminal proceedings, remains inadmissible despite any failure to object to its admission (see *Malaysia National Insurance Sdn. Bhd. v. Malaysia Rubber Development Corp.* [1986] 2 MLJ 124).

- b* His Lordship In the same judgment also made reference to the Privy Council decision in *Gopal Das & Anor v. Sri Thakurji & Anor* AIR [1943] PC 83 and I think it would be instructive to set out here what Sir George Rankin said on this subject in delivering the advice of the Board. At p. 87 he said:

- c* Where the objection to be taken is not that the document is in itself inadmissible but that the mode of proof put forward is irregular or insufficient, it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the record. A party cannot lie by until the case comes before a Court of Appeal and then complain for the first time of the mode of proof. A strictly formal proof might or might not have been forthcoming had it been insisted on at the trial.
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- Reverting to the facts of our appeal, having gone through the notes of proceedings, the submissions of counsel here and in the court below as well as the judgment of the learned Sessions Judge, I am not in any doubt that when counsel for the respondent objected to the “admissibility” of P7 and P8, he was really objecting to the mode by which these two documents were being proved and I say so for the following reasons: firstly, counsel for the respondent expressly mentioned in his submissions in the court below that the plaintiff needed to prove the documents strictly by calling their maker. This is evident from p. 26 of the record of appeal, where counsel for the respondent submitted that “none of the documents were agreed documents therefore it is incumbent on the plaintiff to prove them strictly.” Also, on the same page of the record of appeal, when referring to P7 and P8, counsel for the respondent said this: “P7 and P8. Purported notice sent by the bank’s solicitors. Someone from the firm should have been called to prove the service of the notice because of the specific denial by the defendant.” And finally, counsel for the respondent is recorded as saying with regard to the exhibits produced, “P3-P8 – maker not called.”
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- h* Secondly, on the basis of the submissions made to her, the learned Sessions Judge was herself not in any doubt that the objection to these two documents was as to their mode of proof because at p. 3 of her judgment, the learned Sessions Judge found with regard to P7 that, “P7 was not an agreed document and therefore the maker had to be called to tender it”. With regard to P8, the learned Sessions Judge held that “no witness (I think she meant maker) had also been called to tender the A.R. Card (P8) and therefore there is no proof that P7 was in fact posted to the defendant ...”
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By making reference to the fact that the maker of both P7 and P8 should have been called to tender them, the learned Sessions Judge was no doubt referring to the mode by which they should have been proved and not to the fact that these two documents were in themselves inadmissible.

Thirdly, when counsel for the respondent submitted in the court below that hearsay evidence remains inadmissible, I do not think he was saying that P7 and P8 were in themselves inadmissible, because they were not; they could have been formally proved and tendered in evidence by calling their maker. What counsel was objecting to as hearsay was the evidence of SP2 given about the contents of P7 and P8, when he (SP2) was not the maker of these documents, which is a matter quite different from saying P7 and P8 were inadmissible in evidence.

Since it was the mode of proving these two documents that counsel for the respondent was objecting to, the cases of *Boonsom Boonyanit* and *Gopal Das & Anor (supra)* show that objection should have been taken at the trial before the documents were marked and admitted in evidence. But the question is, in not having done so, was it too late for counsel for the respondent to raise objection to them at the stage of submissions? That the respondent is precluded from so doing, has been answered in the case of *Boonsom Boonyanit (supra)*. In that case, when the matter came on for trial, as the parties had not or could not agree to an agreed bundle of documents, the trial judge directed that as the case proceeded, the parties could object to the admission of any document as and when they were tendered. During the course of the trial the plaintiff tendered documents in evidence which the defendant did not object to when they were being produced. However, after the close of evidence and at the submission stage, the defendant selected which documents they would object to but this was disallowed by the learned trial judge. On appeal, the direction of the learned trial judge *vis a vis* the proof of documentary evidence was the subject of a cross appeal brought by the defendant, but the Court of Appeal held that the learned trial judge was correct in what he did and that it was not open to the defendant to remain silent when documents were being produced and only take objection in final argument. This is what Gopal Sri Ram JCA in delivering the judgment of the court stated at p. 72:

In our judgment, the direction given by the learned judge and his conduct of the case *vis a vis* the proof of documentary evidence was entirely proper. He did the best he could in the circumstances in which he had been placed by the parties failure to agree upon the proof of the documents tendered by the appellant. In view of his direction, it was certainly not open for the respondent to remain silent at the moment of production and take the objection in final argument. (emphasis mine)

- a* I should also point out that a similar view is expressed in *Sarkar's Law of Evidence* 15th edn. This is what is stated at p. 1075 of Sarkar:

Once a document is properly admitted the contents would stand admitted in evidence and if no objection has been raised with regard to its mode of proof at the stage of tendering in evidence such a document, no such objection could be allowed to be raised at any later stage of the case or in appeal. (emphasis mine).

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The rationale in not allowing an objection to be taken at a later stage of the trial to the mode of proving a document when no objection had been taken at the time when the document was being introduced in evidence is that if objection had been taken at the appropriate time, the party seeking to introduce the document might or might not have called formal proof to put in the document. This is made clear from the last sentence of the speech of Sir George Rankin in the case of *Gopal Das & Anor v. Sri Thakurji & Anor* which was quoted earlier.

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- e* I do appreciate that in Boonsom Boonyanit, Gopal Sri Ram JCA was speaking of a situation where the parties could not agree on a bundle of documents whereas in our case, the parties had. But I do not think that fact would make what is stated in Boonsom Boonyanit's case any less applicable here. To me, documents are placed in an agreed or disputed bundle as part of pre-trial preparations and serve primarily to speed up the trial process as the parties and the court know what documents will need strict formal proof and which do not. However, it is my view that a party seeking to rely on a document which is placed in a disputed bundle is not precluded or prevented from trying to have that document admitted in evidence and marked as an exhibit without having to formally prove it. And if such an attempt is made, as it was in this case, it is incumbent on opposing counsel to remain vigilant and object to it immediately so that the party trying to introduce the document is put to strict proof of it; but if opposing counsel is content to remain silent and allow the document to come in without being formally proved, then it would be too late to take objection at the submission stage of the trial because by then it would be beyond the power of counsel relying on that document to formally prove it. I wish to make it clear that what I have said regarding an attempt to have a document found in a disputed bundle being admitted to the record without having to formally prove it only refers to the mode of proving that document and not to the admissibility of the same.

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To conclude, it is my finding that the learned Sessions Judge misdirected herself in law when she allowed counsel for the respondent to object to the admissibility of P7 and P8 at the submission stage and in subsequently rejecting them. Having arrived at the above finding, I next need to decide on the appropriate order I should make in this appeal because whilst the admission of P7 and P8 in evidence should not have been a matter open to objection, what weight is to be placed on P7 and P8 and whether the truth of their contents have been sufficiently established are questions that still need to be decided on. It is the submission of counsel for the respondent, and I agree with that submission, that what has resulted from the failure of counsel for the respondent to object to P7 and P8 being marked as exhibits is that they have become admitted in evidence without formal proof of their existence or authenticity having to be established and to that extent P7 and P8 have become like any other document, placed without any conditions attaching thereto, in an agreed bundle. In so far as the evidential value of such a document is concerned, and the matters a court would direct its mind to in considering that question, I would refer to the decision in the case of *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor* [1997] 4 CLJ 509, where in discussing the evidential value of a document that has become admitted in evidence because it has been included in an agreed bundle without any condition being place on their inclusion in such bundle, this is what Peh Swee Chin FCJ said at p. 511:

First and foremost, the agreed bundle of documents means that the documents therein are authentic and they do exist, therefore they require no proof of their authenticity by calling e.g. their makers.

Secondly, the truth of contents of any of the documents in the agreed bundle of documents is always not admitted unless the contrary is indicated directly or indirectly and such truth of such contents is liable to be challenged in court at the instance of either of the parties.

Thirdly, such documents therein do not form automatically a part of the evidence of the case in question *ipso facto*, but any of such documents does become part of such evidence if it is read or referred to by either of the parties, wholly or partly, at length or in a briefest of mention, either in the examination of any witness, in submission at any stage or even on any unilateral drawing of court's attention to it by either of the parties at any time before the conclusion of the case.

Fourthly, at the end of the whole case, the truth of the contents of any of the document is up to the court to determine, regard being had, *inter alia*, to any absence of challenge by either of the parties on any part of the document and similarly, the question of weight, e.g. either great or no weight to be given to any part of any document is also a matter for the trial court, which considers

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a the document including any “written hearsay” contained therein. The court, may refuse to give any weight at all to any document, but then it is accountable like in other matters, to the parties and to the appellate court for reasons for such refusal.

b The above questions concerning the weight to be given to a document and whether their contents stand proved are matters to be decided by the trial court and until they have been addressed by the learned Sessions Judge are not appropriate to be dealt with by me. In the result, I allow this appeal with costs. The order made by the learned Sessions Judge is set aside and this case is remitted back to the Session Court for the learned Sessions Judge to decide on the matters already adverted to.

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